No. 10,331

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Appellant,

vs.

CECIL WRIGHT,

Appellee.

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

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Appellee in his brief not only contends that his federal sentences have not yet begun to run, but goes further and asserts that they are void because he was denied certain constitutional rights, to-wit, the right to assistance of counsel for his defense, the right to compulsory process to secure witnesses in his behalf, and the right to all the incidents of a fair and impartial jury trial (due process), by the trial Court.

These latter contentions of appellee were not passed upon by Judge William Denman at the time he made the order from which this appeal is taken. All that Judge Denman said in this regard was:

> "His fifteen years of federal sentences will have to be served after the termination of the Illinois

sentence, unless his contention be later maintained that his ten year sentence is invalid.

Wright claims the ten year federal sentence is void because the attorney assigned him by the district court also represented other persons tried with him who had given confessions used at the trial, which confessions involved his participancy in the crime charged. He claims such an attorney would prejudice him with the jury and that he would not be free to conduct a defense with a singleness of purpose the law requires. Glasser v. United States, 315 U.S. 60.

There is no evidence upon which Wright's five year sentence, coming after a signed confession to the federal officers and a plea of guilty, may be held invalid. Not having served that sentence, the claimed invalidity of the ten year sentence cannot be entertained in a habeas corpus proceeding. McNally v. Hill, 293 U.S. 131." (T. 220-221.)

No evidence was taken before Judge Denman on these constitutional issues, excepting so much of the evidence pertinent thereto as was incorporated into the present record by reference to the last case before District Judge A. F. St. Sure (No. 23,647-S). Judge Denman made no findings of fact on these issues.

If this Honorable Court is of the opinion that there is merit to these contentions of appellee and that they have been properly and sufficiently stated in the petition for writ of habeas corpus, the case should be remanded to Judge Denman for the reception of evidence thereon and the making of findings of fact upon the issues raised by the evidence.

No effort will be made to answer these constitutional questions since they are not now properly before this Court and do not constitute the basis for the order of Judge Denman.

Judge Denman concluded that the federal sentences of appellee have not commenced to run and that he is therefore not properly in the custody of appellant at this time.

The only questions before this Court then are:

Have the federal sentences of appellee commenced to run?

If the federal sentences of appellee are not now running, should he be discharged or remanded to the trial Court?

These two questions have been answered in our opening brief.

As appears therefrom:

1. Appellee's federal sentences began to run from the time he was released from the Southern Illinois Penitentiary and taken into custody by the United States Marshal.

2. If appellee's federal sentences are not now running, they are so uncertain as to the date of their commencement as to require, not that appellee be discharged, but that he be remanded to the trial Court for the purpose of having the date of the commencement of his sentences clearly and specifically stated.

Before closing, appellant again reiterates that if Judge Denman's conclusion that "the true construc-

tion (of federal sentences) makes the federal sentences valid" is correct, then the right to complaint of appellee's present confinement on those sentences is not personal to him but is a right which only the State of Illinois can assert.

Ponzi v. Fessenden, 258 U.S. 254, 260;
Wall v. Hudspeth (CCA-10), 108 F. (2d) 865, 866;
United States ex rel. Moore v. Traeger (CCA-9), 44 F. (2d) 312, 313;
United States v. Farrell (CCA-8), 87 F. (2d) 957, 962.

The only case which on its facts might indicate that appellee has a right to complain as to his present custody by appellant is

Grant v. Guernsey (CCA-8), 63 F. (2d) 163.

There, however, the Court acted upon the general rule of comity that the sovereign which first arrests and imprisons a criminal cannot without its consent be deprived of his custody, without considering whether or not the right to complain is personal to the criminal, a factor which, as pointed out in

United States v. Farrell, supra,

it should have taken into consideration.

Grant v. Guernsey, supra, is cited with approval in *United States v. Toman,* 23 F. Supp. 119. However in that case the petition for writ of habeas corpus was not sought by the criminal, but by the United States, the sovereign which first acquired jurisdiction over him.

Under the authorities cited, including the decisions of the Supreme Court and this Honorable Court, it should be perfectly clear that appellant cannot complain of his present confinement at Alcatraz, and the only person who can complain is the State of Illinois.

CONCLUSION.

Appellee's federal sentences are valid, were intended to commence to run upon his release from the Southern Illinois Penitentiary, and constitute legal cause and justification for his present continued detention by appellant.

Furthermore, if appellee's federal sentences are not valid or have not yet commenced to run, he is not now entitled to his discharge but is at most only entitled to be remanded to the trial Court for the purpose of resentence or the fixing of a definite and certain date for the commencing of his sentences.

In either event, the order of Judge Denman discharging appellee is erroneous and should be reversed.

Dated, San Francisco,
April 19, 1943.

Respectfully submitted,

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